BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 30082
	)	
AMARJIT (JACK) SALUJA	)	**BOARD DECISION**
	)	(Precedential)
	)	
From dismissal from the position of Senior Water Resources Control Engineer with the Water Resources Control Board at Palm Desert	)	**NO. 94-16**
	)	May 2-3, 1994

Appearances: Stephen D. Beck, Labor Relations Consultant, Professional Engineers in California Government, representing appellant, Amarjit (Jack) Saluja; Ted Cobb, Senior Staff Counsel, Water Resources Control Board, representing respondent, Water Resources Control Board.

Before Carpenter, President; Ward, Vice President; Stoner, Bos and Villalobos

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board granted two Petitions for Rehearing, one filed by the appellant, Amarjit (Jack) Saluja (appellant), who was dismissed from his position as a Senior Water Resources Control Engineer (Senior Engineer), and the other filed by the department that dismissed appellant, the Water Resources Control Board (Water Board or respondent).

Appellant was dismissed from his position as Senior Engineer for writing anonymous letters to various officials affiliated with the Water Board. The letters were mean-spirited and threatening in nature and caused great distress to their recipients, as well as to other employees of the Water Board.

The Administrative Law Judge (ALJ) who heard appellant's appeal issued the attached Proposed Decision sustaining appellant's dismissal, finding that appellant was the author of the anonymous letters and that the charged misconduct warranted dismissal. In the same Proposed Decision, the ALJ also found that the Water Board had violated appellant's Skelly rights by failing to provide appellant with a copy of a State Police investigation report and consequently awarded appellant backpay up until the date of the decision.

The Board originally adopted the ALJ's Proposed Decision, but subsequently granted the appellant's and respondent's respective Petitions for Rehearing at its July 20, 1993 meeting. Appellant argues in his Petition for Rehearing that there is insufficient evidence in the record to conclude that appellant wrote the letters. The respondent, on the other hand, argues that there is sufficient evidence that appellant wrote the letters and that appellant should not receive backpay because he was not entitled to a copy of the State Police report prior to his Skelly hearing.

After a review of the record, including the transcript, exhibits, and the written arguments of the parties,[1] the Board sustains appellant's dismissal and further finds that respondent did not violate appellant's due process rights by failing to provide a copy of the investigation report to appellant prior to his Skelly hearing.

FACTUAL SUMMARY

We find that the ALJ's findings of fact in the attached Proposed Decision are free from prejudicial error and adopt those findings as our own.

ISSUES

1. Is the charge of writing anonymous letters supported by a preponderance of the evidence?

2. Did the Water Board violate appellant's Skelly rights by failing to turn over the State Police investigation report?

DISCUSSION

Sufficiency of The Evidence

After a review of the record in this case, we are in substantial agreement with the conclusions of law found in the Proposed Decision concerning the charge of authorship of the letters and adopt those conclusions as our own. However, we provide the following discussion in response to the contentions raised in appellant's Petition for Rehearing that there is insufficient evidence in the record to sustain appellant's dismissal.

Appellant's main argument is that forensic linguistic analysis (the process of determining authorship through the examination of similarity in syntax, style, punctuation and grammar in two writings) is not a reliable science, and that the Board is mistaken

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[1] The parties did not request oral argument.

in relying solely upon such an analysis to sustain appellant's dismissal.

In support of this argument, appellant offered the testimony of Dr. Finegan, a linguistics expert, who testified that the respondent's expert witness, Dr. Gerald McMenamin, erred in concluding that appellant was the author of the letters because Dr. McMenamin analyzed only the appellant's writings and not any other person's writings. More importantly, Dr. Finegan testified that forensic stylistic analysis can never be used to identify authorship of anonymous writings as it is not a precise science; there is always a possibility that a writing has been forged or that similarities noted between works are coincidences or simply the result of uses of language which are common to many people.

In addition, appellant points to two cases, U.S. v. Clifford (3rd. Cir. 1983) 704 F.2d 86 and U.S. v. Hearst (9th Cir. 1977) 563 F.2d 1331, to support his contention that the legal world has grave reservations about using forensic linguistic evidence to identify authorship.

In U.S. v. Clifford, supra, 704 F.2d 86, the Ninth Circuit Court of Appeal reversed a trial court's ruling to exclude the use of cursive correspondence in a criminal trial to assist in proving the authorship of a threatening letter. Of significance to the appellant is the fact that the trial court's record reflected that both the expert witness, a professor of psycholinguistics, and the

F.B.I agents responsible for forensic linguistics, had represented that forensic linguistic analysis could not be used as a positive means of identification of an author. In U.S. v. Hearst, supra, 563 F.2d 1331, a judge refused to allow a forensic linguistic expert to testify in a criminal case, finding that the art of forensic linguistics had not achieved general acceptance in the scientific community and the potential for prejudice outweighed any probative value to the evidence.

We do not accept appellant's argument that these cases prevent this Board from relying upon Dr. McMenamin's testimony to support a finding of authorship. As stated in the attached Proposed Decision, there is legal precedence for allowing the use of forensic linguistics in court. In U.S. v. Pheaster (1976 9th Cir.) 544 F2d 353, the Ninth Circuit Court of Appeal upheld the practice of forcing a criminal defendant to give a handwriting exemplar by way of dictating the words to him to see if his spelling of certain words was similar to the spelling used in an anonymously authored ransom note, thus implying that the evidence was probative in determining the note's author. Similarly, in other cases, finders of fact have been allowed to make comparisons between a known document and an anonymous document based upon grammar, spelling, punctuation and the like in determining authorship of the anonymous document. [See e.g. U.S. v. Larson (1979 8th Cir.) 596 F.2d 759; State v. Hauptmann (1935) 115 NJL 412 where juries were allowed to

consider as evidence grammatical and spelling peculiarities in known documents which were shown to be similar to those seen in ransom notes.)

Even the case cited by appellant, U.S. v. Clifford, supra, 704 F.2d 86, noted that linguistical evidence could be used to prove that Clifford wrote the anonymous letters. In allowing a sample of Clifford's correspondence to be admitted into evidence, the court stated:

> The correspondence which the government wanted to present to the jury in this case is relevant. The similarities between the cursive correspondence [an allegedly known writing] and the threatening letters [the anonymous writing], particularly the unusual misspellings, clearly have some tendency to make Clifford's authorship of the threatening letters more probable. The evidence is thus admissible unless 'it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.' Id at page 90, citing Fed.R.Evid 403.

While the appellant correctly states that the Ninth Circuit in U.S. v. Hearst denied the admittance of expert testimony on forensic linguistics on the grounds that it was more prejudicial than probative, we do not believe that that decision renders the use of such evidence in this case unreliable. We note that Hearst was a criminal case where there was a greater burden of proof than the instant case and there were additional constitutional concerns entering into the balancing test. In this case, a civil administrative proceeding, we believe that the probative

value of Dr. McMenamin's expert testimony outweighs any potential prejudice to the appellant.

In conclusion, we believe that there is ample evidence in the record to support a finding that appellant authored the anonymous letters. Dr. McMenamin's testimony concerning the similarities of writing styles and the common usage of Indian English was both compelling and comprehensive. Although we believe the Board would have been justified in sustaining appellant's dismissal solely on such evidence, we note that it was not the only evidence linking appellant to the letters. In addition to Dr. McMenamin's expert testimony, there is also the testimony of appellant's co-workers, Philip Gruenberg, Arthur Swajian and Stuart Winslow Gummer, who testified that they believed, prior to knowing the outcome of Dr. McMenamin's analysis, that appellant was the author of the letters based upon the facts and circumstances surrounding the letters and the content of the letters themselves. These witnesses testified that appellant was one of the few people in the Palm Desert office who would have had knowledge of the facts contained in the letters. Further, they testified that appellant was one of the few people who stood to better his position if the letters were taken seriously. Finally, there is the administrative hearing transcript itself which reveals appellant's poor command of the English language: his poor usage of grammar at the hearing was

strikingly similar to the poor grammar used by the anonymous author of the letters.

Given the totality of the evidence in the record, we believe that the Water Board met its burden of proving, by a preponderance of the evidence, that appellant authored the derogatory anonymous letters.

The Skelly Violation

In the California Supreme Court case of Skelly v. State of California (Skelly) (1973) 15 Cal.3d 194, the court set forth certain procedures that a public employer must follow to satisfy an employee's procedural due process rights:

> At a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. (Emphasis added.)

Pursuant to Skelly, the SPB enacted Rule 52.3 which provides that:

> (a) Prior to any adverse action...the appointing power...shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action....The notice shall include:
>
> (1) the reasons for such action.
> (2) a copy of the charges for adverse action.
> (3) a copy of all materials upon which the action is based.
> (4) notice of the employee's right to be represented in proceedings under this section, and
> (5) notice of the employee's right to respond...
> (Emphasis added.)

In the Proposed Decision, the ALJ found that the Water Board violated appellant's Skelly rights by failing to provide him with a copy of an investigation report prepared by the California State Police in connection with an investigation into the anonymous letters.

The record reveals that when the anonymous letters began appearing, the first and only suspect was an employee named Ron Rodriguez. In 1988, the Executive Officer, Phil Gruenberg, asked for the State Police's assistance in determining whether Rodriguez was responsible for the anonymous letters, as well as for various acts of misconduct occurring around the office. The State Police conducted an investigation, but ultimately failed to positively identify the author of the letters.

In September of 1989, Phil Gruenberg, the Executive Officer, received a copy of a State Police investigation report which had been written by the State Police officer who had conducted the investigation of Rodriguez. In this report, the officer had written a summary of several interviews he had with various people at the Water Board concerning the anonymous letters as well as other incidents that had occurred at the Water Board. All of the names of persons interviewed were redacted from the report so that Gruenberg was not able to determine with certainty which persons were interviewed. Gruenberg decided that this report was worthless and put it aside, not reviewing it or referring to it at any time,

even after appellant became the subject of investigation. He did not share this report with anyone, except the legal department at the Water Board.

Despite the fact that Gruenberg did not review this report or consider it in taking adverse action against appellant, the ALJ found that appellant was entitled to a copy of the report prior to his Skelly hearing pursuant to the Board's Precedential Decision, Karen A. Johnson (1992) SPB Dec. No. 92-02. Upon reviewing the matter, we conclude that the instant case is distinguishable from Johnson and find that the Water Board did not commit a Skelly violation by failing to provide the report to appellant.

As noted in Ronald J. Kraemer (1994) SPB Dec. No. 94-11, the finding of a Skelly violation in Johnson was based on a number of discrete facts. In that case, the adverse action taken against Johnson rested entirely on the testimony of one eyewitness. The department had directed its Senior Special Investigator to investigate allegations of patient abuse against Johnson and prepare a report for the executive director, who was the decision-maker in Johnson's adverse action. The report failed to corroborate the statements of the only witness against Johnson. The executive director reviewed the report in connection with Johnson's adverse action. Based on these facts, we found that Johnson was entitled to the report.

As further noted in Kraemer, the purpose of a pre-termination hearing was addressed by the U.S. Supreme Court in Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532:

> [T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions--essentially, a determination of whether reasonable grounds to believe that the charges against the employee are true and support the proposed action. Id. at p. 545.

In Johnson, the investigator's report should have been provided prior to Johnson's Skelly hearing because it could have been helpful in determining whether reasonable grounds existed to support the adverse action. Unlike the case in Johnson, however, the instant case involves a State Police investigation that did not focus on appellant as the subject of a potential adverse action. In fact, the report was written a long time before appellant was the subject of investigation and all proper names were blocked out in the report, rendering it basically useless in determining whether there were reasonable grounds to support the charges against appellant.

Additionally, the executive director in Johnson reviewed the investigation report in connection with making a determination as to whether to issue an adverse action against Johnson. In this case, the investigation report was not reviewed or considered by Gruenberg as part of the decision-making process in appellant's adverse action. Accordingly, we find that the investigation report

written by the State Police was not one of the materials upon which "the adverse action was based" and respondent did not commit a Skelly violation in failing to provide appellant with a copy of the report prior to his Skelly hearing.

CONCLUSION

The Board sustains appellant's dismissal, finding that a preponderance of the evidence supports the allegation that appellant authored the anonymous letters. The Board finds no Skelly violation by virtue of the Water Board's failure to provide appellant with the State Police's investigation report. Accordingly, appellant has no right to receive backpay.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582, it is hereby ORDERED that:

1. The adverse action of dismissal taken against Amarjit (Jack) Saluja is hereby sustained.

2. This decision (along with the attached Proposed Decision) is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

(Saluja continued - Page 13)

STATE PERSONNEL BOARD

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Floss Bos, Member
Alfred R. Villalobos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on May 2-3, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by AMARJIT (JACK) SALUJA From dismissal from the position of Senior Water Resources Control Engineer with the Water Resources Control Board at Palm Desert	)	Case No. 30082

PROPOSED DECISION

This matter came on regularly for hearing before Byron Berry, Administrative Law Judge, State Personnel Board, on March 24 and 25, 1992, at Palm Desert, California. Final briefs and points and authorities were submitted on November 30, 1992.

The appellant, Amarjit (Jack) Saluja, was present and was represented by

Stephen D. Beck, Staff Consultant, Professional Engineers in California Government.

The respondent was represented by Ted Cobb, Attorney, Water Resources Control Board.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above dismissal effective July 19, 1991, and appellant's appeal therefrom does not comply with the procedural requirements of the State Civil Service Act. In Skelly v. State Personnel Board (1975) 15 Cal.3d

194, the California Supreme Court set forth the

procedures an employer must follow to comply with an employee's procedural due process rights:

> At a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

Pursuant to Skelly, the State Personnel Board (SPB) enacted SPB Rule 52.3 which requires that:

> (a) Prior to any adverse action. . .the appointing power. . .shall give the employee written notice of the proposed action. This notice shall be given to the employee at least five working days prior to the effective date of the proposed action. . . .The notice shall include:
> (1) the reasons for such action,
> (2) a copy of the charges for adverse action,
> (3) a copy of all materials upon which the action is based,
> (4) notice of the employee's right to be represented in proceedings under this section, and
> (5) notice of the employees' right to respond. . .

The State Police did an investigation of some anonymous letters in 1989. On September 25, 1989, a report was submitted to Executive Officer, Phillip Gruenberg, which discussed the results of the investigation. The report was, at best, inconclusive as to the identity of the writer of the anonymous letters. It consisted of statements of people who were interviewed, with all the names in the report blacked out. No definitive conclusions were drawn about the identity of the writer of the anonymous letters. Mr. Gruenberg did not share the report with any one except the Departmental attorneys in Sacramento. There was no evidence that the Department relied on the report to prepare the adverse action against the appellant.

Evidence about the existence of the report surfaced in the appellant's SPB hearing. At that time, the appellant was provided with a

copy of the report. He waived his right to

delay the hearing in order to fully investigate the report.

SPB Rule 52.3 implements pertinent holdings in the Skelly case. It requires the Department to provide a copy of all materials upon which the action is based, in addition to other requirements.

It could be argued that there was no Skelly violation in this matter because the State Police report, which was not given to the appellant at the time that he received the adverse action, was not actually relied on by the Department to prepare the adverse action against the appellant. However, the SPB case of Karen A. Johnson, Case No. 27504, a Precedential Decision, appears to be on point. In that case, the Department directed its Senior Special Investigator to investigate the allegations against the appellant. The investigator conducted an investigation and submitted a report to the Executive Director, prior to an adverse action being issued against the appellant. Neither the appellant nor her representative were aware of the existence of the report until it was discussed at the SPB hearing. The Department argued that the report merely summarized the allegations and contained no conclusions regarding the alleged conduct of the appellant nor recommendations regarding the propriety of an adverse action. As a result, the Department contended that the adverse action was not "based" on the report, and that the appellant was therefore not entitled to see it.

In the above indicated Precedential Decision, the SPB disagreed with the Department's position and stated the following:

> "The report was reviewed by the Executive Director in connection with the adverse action. The fact that the investigation did not corroborate Long's allegations was relevant to the appellant's ability

to convince the Skelly officer to modify or revoke the adverse action.

The appellant was entitled to receive the report along with the other documents that were provided to her prior to the Skelly hearing . . ."

In the current case, the report was reviewed by the Executive Officer in connection with the anonymous letters. The investigation at that time, did not conclude that the appellant was the writer of the anonymous letters. It could be argued that the fact that the investigation did not conclude that the appellant was the writer of the anonymous letters was relevant to the appellant's ability to convince the Skelly officer to modify or revoke the adverse action, and that the appellant was entitled to receive the report along with the other documents that were provided to him prior to the Skelly hearing. It is found that the appellant was entitled to receive that investigative report prior to his Skelly hearing. Such a finding is consistent with the Karen A. Johnson, Precedential Decision in SPB Case No. 27504.

The remedy for a Skelly violation is back pay from the effective date of the adverse action until the date that this decision is filed by the State Personnel Board. Barber v. State Personnel Board, 18 Cal. 3d 395.

II

The appellant has worked as a Senior Water Resources Control Engineer and an assistant Engineering Specialist Sanitation since his appointment on January 17, 1977. Effective May 22, 1991, he received an Official Reprimand for insubordination, inexcusable neglect of duty, inefficiency, inexcusable absence without leave, and willful disobedience.

III

The Notice of Adverse Action alleged that the appellant wrote numerous vicious anonymous letters to the Executive Officer, the Regional Board members, and others.

IV

Between June 1987 and October 1990, the appellant wrote anonymous, obscene letters to individuals at the Colorado River Basin Regional Water Quality Control Board (Regional Board), the State Water Resources Control Board (SWRCB), and other public and private agencies. All of the anonymous letters were typed on a typewriter by the appellant. In compliance with Governments Code Section 19635 (statute of limitations) the Administrative Law Judge modified the adverse action to comply with 19635 by limiting the allegations to those which occurred between July 12, 1988 and October 1990.

A serious and contentious legal dispute arose as to whether or not a forensic linguistic expert could use the anonymous letters written prior to July 12, 1988, to help determine the identity of the writer of the anonymous letters written after July 12, 1988. Points and authorities from both sides were submitted. Pertinent laws and findings will now be discussed.

An expert witness may use evidence which is not otherwise admissible as the basis of an expert opinion. Additionally, evidence of other uncharged misconduct may be used to show the identity of the perpetrator. In neither case does the statute of limitations preclude the use of the evidence.

EXPERT WITNESSES MAY RELY ON ANY LEGALLY RELEVANT EVIDENCE, EVEN IF IT IS NOT OTHERWISE ADMISSIBLE

California Evidence Code, Section 801, states:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion. [Emphasis added.]

Similar language is used in the Federal Rules of Evidence, Section 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. [Emphasis added.]

UNCHARGED MISCONDUCT MAY BE ADMITTED TO
PROVE THE IDENTITY OF THE DEFENDANT WITHOUT
REGARD TO THE STATUTE OF LIMITATIONS

California Evidence Code, Section 1101, provides, in part:

(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her

character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident...) other than his or her disposition to commit such an act.

The case of U.S. v. Anzalone(1986. 1st Cir.) 783 F2d10, dealt with charges of insurance fraud. The defendant had engaged in a similar pattern of filing false claims with other companies some years before. The court admitted the evidence of the prior fraudulent claims to show a pattern and determine the identity of the perpetrator. When the defendant objected that evidence of the other claims should be excluded because the statute of limitations had run, the court replied that while the normal standards of relevancy should apply, "evidence is not rendered inadmissible simply because it relates to a period when prosecution is barred by the statute of limitations."

In Black Law Enforcement Officers v. City of Akron (1987, 6th Cir.) 824 F2d 475 the issue was racial discrimination in promotions within the Akron Police Department. The statute of limitations for such actions was one year; but, plaintiffs sought to introduce evidence of older, uncharged acts of discrimination in order to prove that a pattern existed. The trial court excluded the evidence but was reversed on appeal.

> It is clear that the district court erred in using the statute of limitations to bar the admission of evidence. The function of a statute of limitations is to bar stale claims. American Pipe & Const. v. Utah, 414 U.S. 538, 554, 94 S. Ct. 756, 766, 38 L.Ed.2d 713 (1974).

> "The statute of limitations is a defense..., not a rule of evidence." U.S. v. Ashton, 509 F.2d 793, 798 (5th Cir.), cert. denied, 423 U.S. 829, 96 S.Ct. 48, 46 L.Ed.2d 47 (1975). The decision whether to admit evidence is based on its relevancy and probativeness, see Fed.R.Evid. 401 and 403, not on whether the evidence is derived from events that occurred prior to a certain time period.
> 824 F.2d at 482-483

Most of the cases dealing with uncharged conduct are from the criminal courts; but, it is clear that the issues discussed above apply with equal validity to civil cases.

Featherstone v. Estelle (1991, 9th Cir.-Cal.) 948 F.2d 1497

Black Law Enforcement Officers Assn. v. City of Akron, supra.

Based on the above discussion, it is found that it is legally relevant to consider the anonymous letters written prior to July 12, 1988, as part of the basis of an expert opinion. Moreover, it is legally relevant to examine earlier identical instances of misconduct for the purpose of showing the identity of the writer of the anonymous letters written after July 12, 1988. The forensic linguistic expert concluded that all of the letters written before and after July 12, 1988, were written by the appellant.

V

In September 1990, the appellant wrote an anonymous letter to the Desert Water Agency which was received by General Manager, Jack Oberle. The letter accused Phil Gruenberg of saying the following about the Board Chairman:

"I compared Stu, who controls all Board members with other members. I concluded that Stu's qualifications and experience is quite inferior to that of others, and still he is the commander . . . Most of our Board Members should be considered a trash in supporting environmental issues as compared to the Victorville or Santa Ana Regions".

This was an attempt to destroy an important working relationship between the Regional

Board and an outside agency.

VI

In August 1990, the appellant wrote an anonymous letter to State Auditor General, Thomas Hayes, in which he accused Executive Officer, Phil Gruenberg, of stealing a State vehicle and selling it in Mexico. He falsely stated that he was not a State employee, and signed the letter "Disturbed Taxpayers of Calif."

In September 1990, he wrote an anonymous memorandum to the Chief of the SWRCB, accusing Board member Stu Gummer, of taking bribes from Phil Gruenberg in order to appoint Mr. Gruenberg to the Executive Officer position of the Regional Board.

In September 1990, he wrote an anonymous note to SWRCB Chairman, Don Maughan. The message was entitled "Private Message From Phil." The appellant misrepresented himself as Phil Gruenberg. The note attempted to make it appear that Mr. Gruenberg was highly critical of SWRCB member, Ted Finster.

These accusations were false and were made to create distrust of the Executive Officer and the Regional Board members, and to discredit the Regional Board.

VII

In October 1990, the appellant wrote additional anonymous letters including a letter to the Chair of the SWRCB in which he referred to Mr. Gruenberg, the Executive Officer, as "ignorant scum." He referred to Mr. Gruenberg's wife as a "slut." He also attacked other staff members at the Regional Board office.

In September 1990, he wrote an anonymous letter to the Desert Water Agency. The letter claimed to be "the jist (sic) of a conversation that Phil (Gruenberg) had when we sat down for a beer." It letter stated that Mr. Gruenberg had accused one member of the

Regional Board of purchasing his law degree. It also stated that the Regional Board's Chairman was inferior to the other Regional Board members. This letter contained false information which attempted to harm the reputation of the Executive Officer with an outside agency that works closely with the Regional Board.

VIII

Nineteen anonymous letters were written between June 1987 and October 1990. Art Swajian was the Executive Officer when the letters were initially received. The letters made him extremely upset. He had planned to retire in June 1990. He retired in December 1988. His early retirement was partially due to the letters. The letters caused a lot of friction in the office. The letters were an attempt to force Art Swajian out of office. The writer was trying to put himself in a position to be considered for the Executive Officer position.

An investigation was conducted in 1988, by management and the State Police with inconclusive results. The focus of the investigation was initially on Sr. Water Resource Control Engineer, Joe Rodriguez, who was demoted in February 1989, for reasons not related to the letters. He appealed his demotion; and, an agreement was reached which allowed him to be reinstated to his position, but not as a supervisor. In the investigation, it was eventually concluded that Mr. Rodriguez did not write the letters. It was also determined that he would not send a letter to the Auditor General stating that he was doing illicit things on State time. There were other reasons why it was considered to be illogical for Mr. Rodriguez to write the letters.

When Mr. Swajian retired from his position as Executive Officer at the end of 1988, Phil Gruenberg was chosen to be the new Executive Officer. He suddenly became the target for abuse in the letters. After Mr. Gruenberg took disciplinary action in 1989, against

Mr. Rodriguez for reasons that were unrelated to the anonymous letters, Mr. Rodriguez' name was seldom used in the letters.

In March 1989, the Department's counsel, Joan Gray-Fuson, suggested that the appellant wrote the letters. She found similarities in the writing style of the appellant and the writing style in the anonymous letters. After rethinking the matter, Executive Officer, Phillip Gruenberg, also concluded that the appellant wrote the anonymous letters.

It was felt that the writing in the letters was of British origin. The British version of the English language was used in the letters. The appellant is from India where the British version of the English language is written and spoken. More specifically, the anonymous letters were written in Indian English. Other employees with an Indian English background were considered and eliminated as suspects because they were not in a position to become the Executive Officer. The appellant had an Indian English background, and was in a position to be considered for that position.

The Department of Justice conducted an investigation and came up with inconclusive results. The investigator for the Department of Justice suggested that a linguist be retained to assist in the investigation. A linguist was hired; and, the investigation focused on the appellant.

Samples of the appellant's work related writings were collected, copied, and examined. The appellant and other employees were required to submit monthly section summary reports. The reports and other writings of the appellant were compared with the writing in the anonymous letters. The investigator and the linguist concluded that the appellant wrote the anonymous letters. The appellant was subsequently terminated.

IX

At the hearing, the primary evidence consisted of testimony from two opposing, extremely well qualified linguists who were Professors of Linguistics at the California State University at Fresno and the University of Southern California in Los Angeles. Both of these gentlemen are considered to be some of the most qualified people in the linguistics field. They have published numerous articles on linguistics; and, they have testified as experts in the field on numerous occasions, often against one another.

Linguistics is the study of the nature and structure of human speech. Stylistics is a method of determining the authorship of written material after comparing it with a known sample. It is the scientific study of patterns of variation in written language. Both experts have in depth training and experience in stylistics.

Dr. Gerald McMenamin testified as the respondent's expert witness. He teaches linguistics at the California State University at Fresno. Dr. Edward Finegan testified as the appellant's expert witness. He teaches linguistics at the University of Southern California.

The anonymous letters consisted of approximately 21 typewritten pages. The known writings of the appellant consisted of approximately 148 pages of memorandums, letters, and office notes. The anonymous letters and the appellant's writings both have a large and unique set of style characteristics in the areas of format, spelling, syntax, and other similar writing styles. Dr. McMenamin found that the block of isolated individual features of writing style formed identification features strong enough to establish a common authorship between the anonymous letters and the appellant's writings. He concluded that the frequency, type, and unique combination of style features found in both sets of writings are sufficient to establish a common authorship of the anonymous letters and the

writings.

Dr. McMenamin concluded that the set of Indian English class features identified in both sets of writings is compelling enough to establish that both sets of writings were written in Indian English. He also concluded that the appellant, who is Indian and who writes in an Indian English style, was the writer of the anonymous letters.

Dr. McMenamin made comparisons in four general categories: Typing or writing conventions, spelling, syntax, and other writing conventions. Each of these four categories was broken down into sections in which comparisons were made with both sets of writings.

A. Typing or Writing Convention

1. Spacing After End Punctuation in Typed Material

In the category of typing or writing convention the writer of the anonymous letters does not place 2 spaces after a period. The writer used one space or no space after a period. The appellant used a similar pattern in the only 2 typewritten documents obtained from the appellant.

2. Spacing After Comma in Typewritten Material

Forty percent of the time in the anonymous letters, the comma appears with no space after it. There are also five instances of the comma appearing with a space on its right and left sides in the anonymous letters. Similar patterns were found in the appellant's known typing samples.

3. Missing Capital Letters

On numerous occasions, the writer of the anonymous letters used a small letter when a capital letter should be used. A similar pattern occurred in the appellant's writings.

4. Superfluous Capital Letters

The writer of the anonymous letters often capitalized the first letter of a word that normally does not need a capital letter. This was apparently done to emphasize a word. There were numerous examples of this in the appellant's known writings.

5. Single Capitalized Words in a Small Letter Environment

The anonymous letters emphasized some words or phrases by putting the entire word or phrase in capital letters. This also occurred in the appellant's known writings. It occurred most often in the anonymous letters when some cuss words were capitalized. In one of the known letters, the appellant capitalized the entire cuss word, but he deleted some of the letters of the word.

6. Abbreviations

The anonymous letters and the appellant's known writings both contained numerous abbreviations. Some of the same abbreviations appeared in both sets of documents. For example: E.O. for Executive Officer, Cal and Calif for California, mtg for meeting, Sacto for Sacramento, and sub for subject. Of particular significance to Dr. McMenamin was the term Cal to abbreviate California. Both sets of documents used this abbreviation with some frequency.

7. Page Layout and Organization

Both sets of documents have similar organizational patterns. A frequently used pattern was the use of numbered lists. Another pattern in both sets of documents was the lack of indentation in the paragraphs.

Another identifying characteristic in both sets of documents was the use of the asterisk to the left of a word, phrase, or sentence to emphasize a particular point.

B. Misspellings

1. Same Word Misspelled

There were numerous misspellings in both sets of documents. The following misspellings were found in both sets of documents:

beleive (believe) preperation (preparation).

2. Same Types of Spelling Errors in Both Sets of Documents

Single letters were improperly used when double letters should have been used (as an example, possesses was spelled posesses). This pattern occurred in both sets of documents. Ei was used when the word should have been spelled with an ie. (Believe was spelled beleive).

In both sets of documents, the vowel e was improperly inserted in front of anr. (angery for angry and arbiteration for arbitration).

Another misspelling pattern occurred when a vowel was misspelled. This occurred 5 times in the anonymous letters and 6 times in the known documents. For example, quantities was spelled quantaties; and, surplus was spelled surplas.

The known documents and the anonymous letters had numerous instances of leaving a single letter out of a word. An example of this was the spelling of employee which was spelled as emplyee.

Another misspelling pattern occurred when a whole syllable was left out of a word in both sets of documents. Discontent was spelled as discont in the anonymous letters. In the known documents, expeditiously was spelled expediously, and incidentally was spelled incidently.

There were instances where the final letter of a word, the d, was left out. In the anonymous letters, and was written as ann; and, prejudiced was written as prejudice. In the known documents, standards was spelled standars; and mind was spelled mine.

3. British Spellings

The appellant is from India; and, he uses Indian English in his known documents.

The presence of British spelling in the anonymous letters is a characteristic of Indian English. The British spellings of behaviour (behavior) and licence (license) were used in both sets of writings.

Other British spellings in the anonymous letters are the words, favours and favouring. In the known documents, the word, modelling is another example of a British spelling.

C. Syntax

1. Missing Inflection - s

There were numerous instances in both sets of documents where the s which should be at the end of the word, was missing.

In the anonymous letters, the word sell was used when, sells should have been used; and the word continue was used for the word, continues. Also, in the anonymous letters, Carl Jr. is used in place of Carl's Jr; and coco is used in place of coco's. The anonymous letters contained numerous instances where plural nouns were incorrectly written without an s, as indicated in the following examples:

File (Files)

two method (methods)

5-6 year ago (years) bad feeling (feelings) call that are (calls) all applicant (applicants) laws and regulation (regulations)

various project (projects) a series of recommendation (recommendations) Fact (Facts)

2. Missing Article

The absence of the articles a, an, and the was the most frequently occurring grammatical characteristic shared by the anonymous letters and the known writings. There were numerous instances in both sets of writings of missing articles.

3. Intrusive Article

An intrusive article is one that is used where it should not appear. They occur in both sets of documents, but not as frequently as the missing article. Its significance reflects the article problem in both sets of writings.

Examples of the intrusive articles:

Anonymous Letters

a credit

a great difficulty

a trash

Known Writings

seek a $5,000 from give a good consideration

4. Non-Standard Preposition Use

In both sets of writings, the wrong prepositions were used. There were numerous instances where the preposition at was incorrectly used. Other prepositions incorrectly used were to, of, for, and in.

5. Separate Words Typed or Written Together

Both groups of writings contain words that are improperly joined together. Upto,

outof, and uptil, are examples of words that were incorrectly joined together. Other examples are forthis, overexpenditures, ofany, itis, andsamples, areasssubject and Sanjose

6. Compound Words Typed or Written Apart

In contrast to the separate words typed or written together, both sets of documents contained compound words that were typed or written apart. The word may be was found in both sets of documents. Lip stick and any more are other examples of compound words that were typed or written apart in the writings.

7. Use of Non-Count Nouns as If They Were Count Nouns

The writer of the anonymous letters and the appellant both have difficulty with non-count nouns, which are nouns that cannot appear in a plural form. Evils, mischiefs, and equipments are examples of the non-count nouns found in both sets of writings.

8. Single Word Verbs In Place of Two-Part Verbs

Both groups of writings used a single-word verb for what would normally be a two-part verb. Here are some examples of the single word verbs that were improperly used in the writings:

listens (listens to)

asks (for asks for)

paid (for paid for)

filled (for filled out)

9. Sentence-Initial Adverbs and Conjunctions

Adverbs that are used at the beginning of a sentence are used frequently in both sets of documents. Additionally, but, however, so, and therefore are found in both sets of writings. Dr. McMenamin found it significant that a lot of those types of adverbs were

available; but, only a few were used in the writings.

10. Sentences With No Subject Expressed

Another significant feature of both sets of writings was the use of sentences with subject not expressed. Here are some examples of such sentences:

when (you) retire

(He) Runs to lower

(It) Seems to us that

as (I) supervise others

11. Missing Direct Object Pronouns, Especially "It"

Both sets of writings used transitive verbs which required direct objects. The writings have instances of transitive verbs being used without the object when the object is a pronoun, especially "it." Here are some examples of the missing direct object pronoun.

wrote (wrote it)

information about (about it)

mentioned to (mentioned it to)

threatened (threatened them)

appreciate (appreciate it)

provide (provide them)

12. Direct Discourse for Indirect

Dr. McMenamin concluded that both sets of writings used direct discourse or questions when indirect discourse or questions should have been used. The writings also included numerous direct statements and questions when the indirect form should have

been used. There were numerous examples to support Dr. McMenamin's conclusions. "When can I leave for vacation?" This is an example of a direct question. "He asked when he could leave for vacation." This is an example of the indirect statement which should have been used.

13. Non-Standard Sequence of Tenses

The writer of the anonymous letters had difficulty following the sequence of tense rules of Standard English. The appellant had the same problem which was clearly indicated in the known writings. Verb tenses must agree in Standard English when a main sentence contains a subordinate clause.

For example, in the sentence, "Mary thought she will go," is incorrect because the "will of the sentence must change to "would" because the verb of the sentence, "thought," is in the past tense. The sentence should read, "Mary thought she would go." Both sets of writings contained numerous examples of the verb tenses not agreeing when the main sentence contained a subordinate clause.

D. Other Writing Conventions

1. The Known Writings Contain Numerous Above-line Insertions of Words Sometimes the arrow-like sign [/\] is used. When this sign is used, it is used below the line. In one of 2 anonymous letters using the arrow-like sign, the sign is used below the line. There are numerous examples of this in the known writings.

2. Use of the Term "Following" or "The Following"

Both sets of documents frequently use the term following or the following to introduce a list, or to state what someone said.

3. Similar Content of Some of the Anonymous Letters and Some of the Known

Writings of The Appellant

Here are some examples:

a. Frequent reference to "asshole"

Known Writing - to hire this asshole

Anonymous Letter - But this asshole will

b. Use of "fucking" as a modifier of another word

Known Writing - meet with "F__king Norried

- no "FUC_ing" brain

Anonymous Letters - meet dearest Fucking Cheap Bastered

- YOU WILL LOOKING FUCKING CHEAP

c. Sex with J. B.

Known Writing - how is J.B. in Bed:

Anonymous Letter - literally wanted to take turns to

FUCK her

- We think she got into his pants

d. Reference to Gary being a homosexual

Known Writing - Gary is homosexual, since he always uses lip balm just like women use lipstick.

Anonymous Letter - you know that gary is not a man to face upto anthing. He always uses seat not urinal which men use.

e. Identical Wording

Known Letters - Gary is a white trash because . . .

- Ron said that Art is an old dog, and you cannot teach him any new tricks.

In the known writings of the appellant, he indicates that he is quoting what someone else said. However, that does not negate the similar construction of language indicated in both sets of writings.

Anonymous Letters - you are a piece of trash . . .

- should be considered a trash . . .

- That you are an old dog incapable of learning new tricks.

IX

There are numerous similarities in the writing styles of the appellant's writings and the anonymous letters. The similarities are so numerous that Dr. McMenamin concluded that there was a sufficient basis to establish that both sets of writings were made by the appellant.

He found that both sets of writings contained numerous definite elements of a form of English spoken in South Asia known as Indian English. The English used on the Indian subcontinent of South Asia is a form of English that differs from other forms of English.

In India, a number of native languages are used like Hindi and Punjabi. These languages have many of the characteristics that appear in Indian English. The similarities between the appellant's writings and the anonymous letters were written in Indian English.

At the hearing, Dr. McMenamin identified the examples of Indian English found in both sets of writings. He also did a systematic analysis of pertinent features of Indian English found in both sets of writings.

The evidence also established that the letters were written by someone who wanted Arthur Swajian's Executive Officer job. The appellant was the only Indian English speaking person at the office who was eligible to be promoted to that position after Arthur Swajian

retired.

Dr. McMenamin found 26 categories of similarity in the anonymous letters and the appellant's writings. He concluded that the large number of similar characteristics and the strength of the characteristics in both sets of writings indicated that the appellant was the writer of the anonymous letters. The appellant denied writing the anonymous letters; but, his denial was not credible in view of the weight of the evidence indicating that he was the writer, as meticulously articulated by Dr. McMenamin. His conclusions are adopted by the Administrative Law Judge. It is found that the appellant wrote the anonymous letters.

The appellant's expert witness, Edward Finnegan, has his Doctorate in Linguistics, and is also eminently qualified in the Linguistics field. He conducted his own analysis of the evidence and concluded that Dr. McMenamin's investigation of the appellant was invalid because the appellant was the only person investigated. He believes that the Department's investigation would have more validity if other people had also been investigated by Dr. McMenamin. He stated that it was not possible to conclude that the appellant wrote the anonymous letters if he was the only person investigated. He also stated that if more than one person is investigated, it can only be determined that a particular person is most likely the writer of the anonymous letters.

Notwithstanding Dr. Finnegan's opinion, it is found that the appellant wrote the anonymous letters. There are numerous civil and criminal cases that have been litigated in which findings have been made concerning the identity of a perpetrator where the investigation has focused on one person. The conclusions and findings were not invalidated because the investigation was only focused on one person.

(Saluja continued - Page 24)

* * * * *

PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

There were too many similarities in the anonymous letters and the appellant's writings to fail to reach the conclusion that the appellant wrote the anonymous letters. In addition to the similarities, Dr. McMenamin provided a meticulous and detailed analysis of the comparisons to pertinent parts of both sets of writings which pointed to the inescapable conclusion that the appellant wrote the anonymous letters. A significant feature of those letters was the Indian English that was used that was identical to the Indian English used by the appellant in his known writings. The appellant's denial that he wrote the anonymous letters lacks credibility in view of the linguistic analytical evidence against him.

There is legal precedent for the use of forensic linguistics in court.

Black's Law Dictionary (6th Ed., 1990) defines forenic linguistics as a A technique concerned with in-depth evaluation of linguistic characteristics of text including grammar, syntax, spelling, vocabulary and phraseology, which is accomplished through a comparison of textual material of known and unknown authorship, in an attempt to disclose idiosyncracies peculiar to authorship to determine whether the authors could be identical. (P.648)

Wigmore states that traits such as spelling, and the grammatical use of words have been freely used to determine authorship. (2 Wigmore on Evidence [3d ed.] #383 at 413.

The Am. Jur. Proof of Facts states:

An especially fruitful field of investigation in identifying the typist is the personal, literary, or stylistic irregularities or characteristics to be found in the document. In the composition of any extended manuscript nearly everyone betrays a fondness for certain words, phrases, or punctuation marks, which produces a pattern of composition that is unique. With typists of average skill, certain characteristic transpositions find their way into any manuscript of length. (20 Am. Jur. Proof of Facts, #20, at 286-287).

The Federal Rules of Evidence specifically permit authentication of disputed documents through consideration of "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(4).

Section 720 of the California Evidence Code provides:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

The evidence established that the appellant did, in fact, write the anonymous letters. Insubordination, dishonesty, discourteous treatment of the public and other employees, and other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the employee's agency or department have all been established by the weight of the evidence.

* * * * *

WHEREFORE IT IS DETERMINED that the dismissal taken by respondent against Amarjit (Jack) Saluja effective July 19, 1991 is hereby sustained without modification.

Because of the Skelly violation previously discussed, the appellant is entitled to back pay from the effective date of this adverse action, July 19, 1991, to the date that the State Personnel Board's decision is filed. Said matter is hereby referred to the Administrative Law Judge and shall be set for hearing on written request of either party in the event the

parties are unable to agree as to the amount of back pay due the appellant under the provisions of Government Code Section 19584.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: April 30, 1993.

BYRON BERRY
Byron Berry, Administrative Law
Judge, State Personnel Board.